

**Sawyer Lumber Co., L.L.C. and United Paperworkers International Union, AFL-CIO, CLC, Petitioner.**  
Case 30-RC-5981

September 30, 1998

**DECISION AND CERTIFICATION OF  
REPRESENTATIVE**

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held March 19, 1998, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The final tally of ballots shows 37 votes for and 36 against the Petitioner.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings<sup>1</sup> and recommendations, and finds that a certification of representative should be issued.

The Employer excepts to the hearing officer's recommendation to overrule its Objections 1 through 7, which allege that conduct by the Board agent in charge of the election compromised the integrity of the election and, thus, requires that the election be set aside and a new election ordered. As explained below, we find no merit in the Employer's objections. Accordingly, we shall certify the Petitioner.

*Objection 1*

The Employer alleges that the Board agent closed the polls on election day before the 6:30 p.m. time<sup>2</sup> agreed to by the parties, thereby disenfranchising eligible voters. Specifically, the Employer contends that the Board agent began dismantling the voting booth at 5:58 p.m. It further contends that, at about 6:15 p.m., the Board agent began rearranging the furniture in the voting room in preparation for the election tally, rearranged the NLRB election signs inside the voting room, and removed the sole sign posted outside the voting room.<sup>3</sup> It is undisputed, however, that 73 of the 75 eligible employees had voted by 6 p.m. No eligible voter appeared at the polls after the Board agent began his preliminary activities.<sup>4</sup>

<sup>1</sup> The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

<sup>2</sup> The parties originally agreed to conduct the election between 2 and 5 p.m. EST, but later agreed to extend the voting period from 2 to 6:30 p.m. The notice of election that was posted by the Employer accurately reflected the 2-6:30 p.m. voting period. There is no claim that eligible voters were aware of or confused by the change in the voting period.

<sup>3</sup> As noted by the hearing officer, the evidence varies as to the exact time of these events. No witness testified that any of these activities commenced any earlier than the times alleged by the Employer.

<sup>4</sup> The *Excelsior* list contained 78 names. Prior to the election, the parties agreed to strike 3 of the names, leaving 75 eligible voters. Both

The evidence reveals that the Board agent undertook some preliminary preparations in anticipation of the end of the voting period and the tally of ballots. We find, however, that his activity did not constitute an early closing of the polls. The door to the voting room remained open from 6 to 6:30 p.m. and at least one election sign remained posted inside.<sup>5</sup> The Board agent and the election observers remained on duty and ready to accept the ballot of any eligible employee who might have shown up to vote. Although the voting booth may have been partially or wholly dismantled sometime before 6:30 p.m., the Board agent was prepared to reassemble the booth if necessary and could have done so expeditiously.<sup>6</sup>

*Objections 2-5*

The Employer contends that the Board agent allowed the election observers to take four breaks during the election and took one break himself, thereby exposing the ballot box and the blank ballots to tampering, and further, that the Petitioner's election observer talked with employees who were eligible to vote during one of the breaks.

When the integrity of the election process is challenged, the Board must decide whether the facts raise a "reasonable doubt as to the fairness and validity of the election." *Dunham's Athleisure Corp.*, 315 NLRB 689 (1994), quoting *Allied Acoustics*, 300 NLRB 1181 (1990). In *Polymers, Inc. v. NLRB*, 414 F.2d 999, 1004 (2d Cir. 1969), enfg. 174 NLRB 282 (1969), the court held as follows:

A *per se* rule [setting an election aside if there is  
a] possibility [of irregularity] would impose an

of the eligible employees who did not vote appeared at the hearing. One testified that he elected to stay home and sleep rather than vote in the election. The other testified that he could not vote because he was out of town for reasons unrelated to the business of the Employer. Thus, it is clear that the failure of the two employees to vote was wholly unrelated to the Board agent's conduct. All eligible voters are thus accounted for, and there is no showing that any voter was disenfranchised by the Board agent's conduct. No party has alleged objectionable conduct in relation to the *Excelsior* list.

<sup>5</sup> The Board has held that the failure of a Board agent to post any voting signs designating a polling area is not objectionable conduct. *Pacific Grain Products*, 309 NLRB 690, 690-691 (1992).

<sup>6</sup> The Board has held that merely dismantling a voting booth before the agreed-upon closing time is not a basis for setting aside an election when there is no showing that any eligible voter was disenfranchised. *O.K. Van & Storage*, 122 NLRB 795, 796 (1958). The Employer contends that the Board agent's dismantling of the voting booth is inconsistent with the requirements of the NLRB Casehandling Manual (Part Two), Representation Proceedings. As the hearing officer correctly noted, it is well settled that the provisions of the Casehandling Manual are not binding rules and are merely intended to provide guidance. See *Queen Kapiolani Hotel*, 316 NLRB 655 (1995), and cases cited there. The Board does not invalidate an election based on deviations from the Manual's guidelines that do not raise a "reasonable doubt as to the fairness and validity of the election." *Kirsch Drapery Hardware*, 299 NLRB 363, 364 (1990), quoting *Polymers, Inc.*, 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969).

overwhelming burden in a representation case. If speculation on conceivable irregularities were unfettered, few election results would be certified, since ideal standards cannot always be attained.

As we explain below, we find that the Employer's Objections 2–5 amount to little more than speculation about the possibility of irregularity and, thus, do not raise a reasonable doubt as to the fairness and validity of the election.

We turn first to the Employer's allegations that the ballot box was subject to tampering during breaks taken by the Board agent and the election observers. As an initial matter, we note that the number of ballots cast in the election—73—matched the observers' checkoff on the *Excelsior* list of the names of 73 eligible employees who actually voted. Thus, it is clear that no extra ballots were cast.

Neither election observer was ever alone with the ballot box. The Board agent instructed the observers that they were required to accompany one another on breaks and that they should not discuss the election between themselves or with others. The observers complied with these instructions. Further, the ballot box was never left unattended.<sup>7</sup> The Board agent stayed in the voting room and maintained control over the box while the observers were out of the voting room. Conversely, when the Board agent took his break, the ballot box remained in the voting room under the "watchful eyes" of both election observers.<sup>8</sup> There is no evidence that anyone tampered with the ballot box while either the Board agent or the observers were out of the voting room. During the Board agent's break and one of the observers' breaks, a voter came to cast a ballot and was instructed to wait until the Board agent and observers were all present in the voting room. The voters did so, without incident, and without tampering with the ballot box or otherwise interfering with the election process. In agreement with the hearing officer, we find no evidence of any security breach involving the ballot box or the ballots, nor evidence that the integrity of the election was compromised in any way by the Board agent's conduct.

<sup>7</sup> Compare *Austill Waxed Paper*, 169 NLRB 1109 (1968) (election result overturned where the ballot box and balloting areas were left wholly unattended).

<sup>8</sup> The Employer contends that the Board agent's failure to tape the ballot box closed does not meet the requirements of the NLRB Casehandling Manual. As noted elsewhere in this decision, the Casehandling Manual provides guidelines rather than procedural rules. Mere failure to strictly follow the Manual's guidelines is not objectionable conduct. The evidence regarding whether the Board agent sealed the ballot box during his or the observers' breaks is inconclusive. It appears that he may have sealed the box with tape during the observers' first break but not thereafter. The Board has held that a Board agent's failure to tape a ballot box is not objectionable when the evidence indicates that the ballot box was never left wholly unattended. See *Anchor Coupling Co.*, 171 NLRB 1196 (1968).

We turn next to a related contention regarding the safeguarding of blank ballots by the Board agent.<sup>9</sup> The contention is that at times during the voting period the Board agent left the blank ballots resting on the table where he and the observers were sitting and, thus, rendered them subject to tampering. The evidence shows that the Board agent either held the blank ballots in his hands or placed them on a table immediately in front of where he sat during the election period. Thus, the hearing officer found that the Board Agent "maintained vigilance" over the blank ballots at all relevant times. There is no evidence that anyone touched or tampered with the blank ballots at any time when they might have been resting on the table in front of the Board agent, rather than in his hands.

The Board agent and the Petitioner's election observer testified that the Board agent took the blank ballots with him when he took a restroom break. The Employer's election observer could not recall whether the Board agent took the blank ballots with him. There is no evidence that he did not. Thus, the hearing officer found it "likely" that the Board agent took the blank ballots with him when he went on break. He found, in any case, that both observers stayed behind in the voting room and maintained vigilance over the blank ballots, as well as the ballot box, in the Board agent's absence. Neither the election observers nor the Employer, in its objections, alleged that the blank ballots had been tampered with or handled by anyone other than the Board agent during the Board agent's absence. Accordingly, in agreement with the hearing officer, we find that the Board agent's handling of the blank ballots was not objectionable conduct. See *Anchor Coupling Co.*, supra; *General Electric Co.*, 119 NLRB 944 (1957).

In finding that the Board agent's handling of the ballot box and the blank ballots was unobjectionable, we do not minimize the important responsibility that the Board places on the Board agent in charge of an election to safeguard the ballot box and ballots against tampering and to maintain the integrity of the election process. We merely find that, here, there is no evidence that the ballot box or the ballots were left unattended at any time, or that they were tampered with, or that the Board agent's handling of the ballots and ballot box raised any reasonable doubt about the integrity of the election.

Finally, we address the Employer's allegation that the Petitioner's election observer talked with employees who were eligible to vote when the observer went to the lunchroom to purchase drinks during a break. At most, the evidence shows that, as the election observers entered the lunchroom, one eligible voter said to the Petitioner's

<sup>9</sup> Although the Board agent's handling of the blank ballots was not the subject of timely filed objections, we agree with the hearing officer that this matter is sufficiently related to the Employer's objections to warrant consideration.

observer, “How’s it going?” The Petitioner’s observer responded “good” and continued on to purchase a drink.<sup>10</sup>

The Board’s *Milchem* rule prohibits “prolonged conversations between representatives of any party to the election and voters waiting to cast ballots.” *Milchem*, 170 NLRB 362 (1968). However, a “chance, isolated, innocuous comment or inquiry” will not “necessarily void the election.” 170 NLRB at 363. Accord: *Textile Workers v. NLRB*, 815 F.2d 225 (2d Cir. 1987); *NLRB v. Oesterlen Services for Youth*, 649 F.2d 399 (6th Cir. 1981), cert. denied 454 U.S. 1031 (1981).

Here, the exchange between the Petitioner’s observer and the employee did not occur in the polling area while the employee was waiting in line to vote. Rather, it occurred in the lunchroom during a break. But, even assuming arguendo that the *Milchem* rule applies to this conduct, we agree with the hearing officer that it was nothing more than an “innocuous ‘social pleasantries’ [that] would not have influenced any voter.” As described by the Employer’s observer, the exchange was initiated by the employee and made no reference to the election. The Petitioner’s observer gave a one-word acknowledgment, without reference to the election, and continued about his business. Accordingly, we find that the exchange is not objectionable conduct warranting a new election.

#### Objection 6

The Employer alleges that the “NLRB agent allowed conversation between Petitioner’s Observer and voting employee(s) in the voting area.” In support of this objection, the Employer contends that Mike Wirtanen, an eligible voter, entered the voting room and, speaking to nobody in particular, asked if he had to wait until his assigned time to vote.<sup>11</sup> It appears that the Board agent told Wirtanen that he could vote immediately. Wirtanen then attempted to discuss a business-related matter with the Petitioner’s observer, specifically, Wirtanen’s failure

to refuel a piece of equipment at the end of a shift.<sup>12</sup> The Board agent ascertained that the matter was, indeed, strictly job-related before giving the Petitioner’s observer permission to talk to Wirtanen.<sup>13</sup> Upon learning that Wirtanen had not refueled the equipment, the Petitioner’s observer replied “don’t worry about it.” No other voters were present during the conversation.

The Employer contends that the Petitioner’s observer’s excuse of Wirtanen’s failure to “complete all of his assigned tasks” constitutes favorable treatment of Wirtanen by the Petitioner’s observer “the effect [of which] . . . on Wirtanen’s vote cannot be ignored.” The Employer did not adduce any evidence in support of this contention.

We do not find objectionable the conversation between Wirtanen and the Petitioner’s observer. The conversation was brief, strictly work related, and did not touch on the election. Thus, we find that this conversation did not run afoul of the *Milchem* rule, discussed above. We find no merit in the Employer’s bare speculation regarding the alleged “favorable treatment” of Wirtanen by the Petitioner’s observer. Accordingly, we overrule Employer’s Objection 6.

#### Objection 7

The Employer contends that the Board agent “breached the security of the polling area” by unlocking a door in the voting area, asking if the Petitioner’s observer would like to go outside and smoke, and looking outside the door before relocking it. Thus, according to the Employer, “This clear deviation from the security provided to the polling area, particularly when considered in total with [the Board agent’s] other misdeeds, clearly requires that the election results be set aside.”

We find no merit in this objection. It is undisputed that, in conjunction with a discussion whether Petitioner’s observer would take a smoking break,<sup>14</sup> the Board agent unlocked one of several doors in the voting room—one which lead to the outside of the facility—and that he looked outside the door for a moment before re-securing it. Nobody entered or exited from the open door. There is no evidence that any voters were present while the door was open. The Employer has failed to show how merely opening and closing a door tainted the laboratory conditions for the election and warrants that the result be overturned.

<sup>10</sup> It is not clear whether this employee had voted before he greeted the Petitioner’s observer in the lunchroom. Contrary to the Employer’s assertion in its brief, there is no evidence that “[Petitioner’s observer] was asked how the election was going.” The Employer’s observer testified as set forth above. She had received the same instruction as had the Petitioner’s observer yet, significantly, she did not complain to the Board agent about the alleged conversation on the observers’ return to the voting room several minutes later. The Petitioner’s observer did not recall having a “conversation” with anyone in the lunchroom. He did recall that when the Board agent instructed the observers not to talk to anyone during the election period, he expressed to the Board agent his “worry” that his fellow employees, whom he always greeted, might “get mad” if he ignored their greetings. The Board agent told the Petitioner’s observer that returning greetings “probably wouldn’t be a good idea,” and the observer agreed.

<sup>11</sup> Although the notice of election provided that eligible employees could vote at any time during the election period, it appears that the Employer assigned employees specific voting times in an effort to minimize disruption of work. It appears that Wirtanen was attempting to vote at shift change. There are no objections to the Employer’s assignment of voting times or Wirtanen’s attempt to vote at other than his assigned time.

<sup>12</sup> Wirtanen was filling in at work for the Petitioner’s observer during the observer’s duty at the election.

<sup>13</sup> Wirtanen testified that both the Board agent and the Petitioner’s observer responded to his question whether he could vote immediately. The Petitioner’s observer testified that the Board agent, alone, responded. Wirtanen and both election observers agree that Wirtanen did not discuss the business issue with the Petitioner’s observer until he had obtained permission from the Board agent.

<sup>14</sup> The Petitioner’s observer testified that he inquired about taking a smoking break but declined to do so, after obtaining permission from the Board agent, because he did not want to violate the Employer’s no-smoking policy.

Having found no merit in the Employers objections, we shall certify the representative.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Paperworkers International Union, AFL-CIO, CLC, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees employed by the Employer at its Gwynn, Michigan, facility, but excluding office employees, clerical employees, forestry staff and scalers, quality control staff, professional employees, guards and supervisors, as defined in the Act.